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Supreme Court of the United States

October Term, 1930

No. 57

STORY PARCHMENT COMPANY
Plaintiff-Petitioner

v.

THE PATERSON PARCHMENT PAPER COMPANY
and
KALAMAZOO VEGETABLE PARCHMENT COMPANY
Defendants-Respondents

RESPONDENTS' PETITION FOR REHEARING

EDWARD F. McGLENNEN
JOSEPH M. DOHAN
For Respondents.

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RESPONDENTS' PETITION FOR REHEARING

The respondents respectfully request leave for a rehearing of this case on the ground, first, that the Court has been led into a misapprehension as to the contents of the record; and second, that the Court has decided against the respondents on four assignments of error not passed on by the Circuit Court of Appeals and without the consideration of any brief thereon for the respondents and without an opportunity to the respondents to present argument in support of these assignments. These grounds in more detail are as follows: —

The respondents'-defendants' first assignment of error was the refusal of the defendants' motion to direct a verdict for the defendants on the ground that on all the evidence the plaintiff is not entitled to a verdict (R. 607).

This assignment was sustained in the Circuit Court of Appeals (R. 621).

This made it unnecessary for the Circuit Court of Appeals to pass in terms upon the other assignments although its opinion was favorable to some of the other assignments. That Court said: — "In this respect we think the charge was defective" (R. 618).

FIRST

THE COURT HAS BEEN LED INTO A MISAPPREHENSION AS TO THE CONTENTS OF THE RECORD

The defendants' principal contention was that there was **no evidence** that the defendants' acts were a **combination to monopolize or to restrain trade.** It was not that the weight of the evidence was one way or the other.

The Circuit Court of Appeals had no occasion to deal at length with this contention, because of its conclusion that the evidence was insufficient to warrant the jury in finding that the plaintiff suffered injury from any illegal acts of the defendants. The only statement of any ruling or finding by that court against the defendants is that "without expressing any opinion as to the soundness of the jury's conclusion, there was sufficient evidence to go to the jury on the issue of a concerted action by the three old companies to fix their prices so as to prevent the plaintiff from acquiring any part of **their** trade" (R. 616).

There is no finding by the Circuit Court of Appeals that there was any conspiracy to monopolize or to restrain trade.

Most traders fix their prices so if possible as to prevent competitors from acquiring any part of their trade. This Supreme Court, in its opinion handed down February 24, 1931, says: — "There is evidence in the record to the effect that the three companies named, prior to the time petitioner entered the field, had maintained uniform prices and enjoyed a substantial monopoly of the interstate trade in parchment paper. There is also evidence, sufficient to justify the action of the district court in submitting the issue to the jury, that after petitioner began business the three companies combined

and conspired to continue this monopoly in violation of §2 of the Sherman Anti Trust Act, c. 647, 26 Stat. 209. The verdict of the jury and the judgment thereon of the district court have the effect of a finding in favor of petitioner upon that issue; and to that extent the verdict and judgment were sustained by the court below. There is enough evidence in the record to preclude an interference on our part with these concurrent findings."

With the utmost respect it is submitted that this states more of a finding than the Circuit Court of Appeals had made. That court made no findings except in its opinion. In that opinion it finds that the three companies were the only producers in this country (R. 614); and that they maintained an association for discussion of questions affecting their common interests, holding meetings every two months at which representatives of such companies with their counsel attended and discussed the condition of the trade (R. 614); and that they had maintained a uniform price for their product and enjoyed a practical monopoly (R. 614); and that the plaintiff or its organizers knew this when they entered the field (R. 615); and that the plaintiff entered and started and precipitated a price war (R. 615).

The Circuit Court of Appeals ruled that individuals may in competition lawfully reduce prices below a fair and reasonable level (R. 618).

This Supreme Court purports to rest its opinion not on its own examination of the record but on the supposed finding of the Circuit Court of Appeals, concurring with the jury, that the three companies had combined and conspired to continue a monopoly in violation of Section 2.

It is respectfully submitted that an examination of the opinion of the Circuit Court of Appeals shows (R. 614) that it used the term "monopoly" as meaning that the three companies were the only manufacturers and, therefore, had substantially all the trade. It was not

used to indicate that that condition had come about by any unlawful conspiracy or by any other unlawful step.

If the case is to be disposed of on the findings of the Circuit Court of Appeals, in confirmation of those of the jury, the case presents the clear-cut issue of law, whether concerted action to fix prices so as to prevent competitors from acquiring existing trade and so as to retain that trade is, without more, unlawful conspiracy.

It is respectfully submitted that this question of law is not dealt with in the opinion of the Court. It is submitted that it would require a new step in the development of the law, to reach such a conclusion; and that, judged by the decisions of this Court heretofore, concerted action in fixing prices low enough to prevent competitors from acquiring existing trade by getting the existing trade for themselves, is not an unlawful act.

In the absence of agreement, the decisions of this Court heretofore have led counsel advising clients what they lawfully may do, to believe that it was not unlawful if they "as a necessary measure of self-protection made generally material reductions in the prices" of the goods which they manufacture (*United States* v. *International Harvester Co.*, 274 U. S. 693, 708) or associate for their common interest even if "uniformity of prices and limitation of production are necessary results of these activities of the defendants" and "there is a substantial uniformity of price" and "variations in price by one manufacturer are regularly followed by like variations throughout the trade (*Cement Manufacturers Protective Assn.* v. *U. S.*, 268 U. S. 588, 604, 605; *Maple Flooring Manufacturers Assn.* v. *U. S.*, 268 U. S. 563, semble).

The evidence in the record goes no further than this. There is no evidence that at the meetings of the Parchment Association anything wrong had been said or done. They are set out in great detail in the record, and fully summarized in the original brief for the defendants

(pages 37 to 43). There is no evidence that in any meetings or communications between the defendants they had said or done anything wrong. These are set out in great detail in the record and fully summarized in the principal brief (pages 13 to 37).

This record is not one of conflicting evidence. It shows no wrongdoing unless this is: — The three concerns were the only manufacturers. Importation was not large. They met frequently and discussed their common interests. Without any agreement, each had prices substantially the same as the others. They let each other know when they were going to make general changes in price lists. The plaintiff knew of this situation. The plaintiff started a price war against the defendants. The defendants discussed the plaintiff's methods. They made no agreement to reduce prices. They continued as before, to let each other know when they were going to make a general reduction. The reductions never brought the prices below those already quoted by the plaintiff. **They were made for the purpose of keeping the existing trade of the defendants.**

Nothing in the record has been pointed out by briefs or oral argument for the plaintiff that constitutes any combination or conspiracy or any other unlawful act.

It is respectfully submitted that the opinion proceeds upon the belief that there was something more in the record and in the opinion of the Circuit Court of Appeals than was there.

Unless the Court means that this state of facts without more constitutes an unlawful combination or conspiracy to monopolize, there was no evidence on which a jury could base a finding that there was an unlawful combination or conspiracy to monopolize. It is respectfully submitted, in view of the prior decisions of this Court cited above, that it was not the intention to say that that much and no more constituted an unlawful

conspiracy or combination to monopolize, and that the opinion is based on the belief that there is something more in the record than is there.

This opinion, if it stands, **will be read to mean,** for applied to the record facts, it amounts to saying **that it is the law, that if a new comer with knowledge that the old have uniform prices enters the field with cut prices** (R. 615), **all the old may not reduce theirs at the same time, but must keep them up and let the new get their existing trade, or they will be guilty of the crime of attempting to monopolize in violation of section two.** It is submitted that this has not been the law and that it should not become so.

SECOND

THE COURT HAS DECIDED AGAINST THE RESPONDENTS ON FOUR ASSIGNMENTS OF ERROR NOT PASSED ON BY THE CIRCUIT COURT OF APPEALS AND WITHOUT THE CONSIDERATION OF ANY BRIEF THEREON FOR THE RESPONDENTS AND WITHOUT AN OPPORTUNITY TO THE RESPONDENTS TO PRESENT ARGUMENT IN SUPPORT OF THESE ASSIGNMENTS

The time allowed for argument was insufficient properly to present the fundamental question in the case and to leave any time in which to discuss the other assignments of error. The brief for the petitioner (p. 10) said: — "We understand that we have the right to discuss and intend to urge only those errors of the Circuit Court of Appeals made the basis of the petition for certiorari." That brief contained no reference to the other assignments of error.

The defendants' counsel believed that it was the desire of the Supreme Court that questions not considered by the Circuit Court of Appeals and not involved in the fundamental question before the Supreme Court, should be passed upon first by the Circuit Court of Appeals (*Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 245; *Brown and Schermerhorn* v. *Fletcher*, 237 U. S. 583, 588; *Krauss Bros. Lumber Co.* v. *Mellon*, 276 U. S. 386, 394). This assumption was stated in the original brief for the respondents (page 2), filed after reading the above quoted statement in the brief for the petitioner. Counsel for the respondents were not aware from anything that occurred in court or otherwise, until the decision of this case, that they were under a misapprehension. In view of this misapprehension, defendants ask that they may have an opportunity to present either to this Court or to

the Circuit Court of Appeals, whichever best serves the convenience of the Court, arguments in support of the Fourth, Sixth, Seventh and Eighth assignments of error.

The Circuit Court of Appeals has already said with respect to one of the assignments: — "In this respect we think the charge was defective and must have misled the jury as to the measure of damages on this phase of the case (R. 618).

The defendants ask leave to file the following brief: —

Fourth Assignment

The District Court erred in the Charge to the Jury as to Recovery on Account of Plant Value

The portion of the charge in this respect to which exception was taken, was that: —

"I am going to let you gentlemen decide whether it was diminished at all, and, if so, to what extent, if you are able to do it . . . if you believe that that [Mr. Goldmann's testimony] is to be taken as a good basis for your conclusion as to the extent of the diminution, why, the difference between the cost and the present value would be $160,000. Of these two elements, the loss of profits on the goods sold, if you find that all the conditions existed that I have enumerated, and that the plaintiff can recover *that* loss would be $20,000, and whatever you may find, if anything, will fairly and reasonably represent the extent to which the value of the property is diminished. I think that it must be so that there has been a diminution; I think that it must be said that the property has diminished. It is worth less with the company out of business than it would be with the company in business. If upon the evidence you are able to say how much, that, of course, would be an element of damage . . . I think that the only thing that you can consider in estimating the damages to be awarded the plaintiff in this suit is the

loss in profits on the goods actually sold, and the loss sustained in the damage to its property" (R. 607).

It is respectfully submitted that this portion of the charge was objectionable (R. 604) because **it assumed that the plaintiff would have been able to go on in business** if there had not been a combination (R. 604). Under the instruction as given, if the jury found that there was a combination and that the plant was worth less than it cost, the difference was recoverable **even if the jury reached the conclusion that the plaintiff would have been unable to go on in business anyway.** Under this portion of the charge, if the jury reached the conclusion that there was a combination and that the value of the property had been diminished, it became the duty of the jury to find a verdict against the defendants for the amount of that diminution, even if they did not reach the conclusion that the combination was the cause of the diminution, and even if they reached the conclusion that the plaintiff could not have succeeded in any event. **There is nothing in the charge to advise the jury that there must be any element of causation from the combination to the diminution** (R. 601).

The only damages which the plaintiff had any right to recover were those which the plaintiff sustained "by reason of" any combination or conspiracy if any, of the defendants (*Code*, Title 15, §15.)

It is not enough that the defendants restrained trade or monopolized it and that the plaintiff did not succeed in business. It must appear also that the plaintiff's damages were in an ascertainable amount and that they were caused "by reason of" the defendants' unlawful conduct.

Jack v. *Armour & Co.*, (C.C.A. 8th) 291 Fed. 741, 745 Semble.

Noyes v. *Parsons*, (C.C.A. 8th) 245 Fed. 689.

Sixth Assignment

The District Court erred in admitting a question to the witness Goldmann, and the answer thereto, as to Market Value

This question was, "Now I am going to ask you if you will state what was the fair market value of the entire plant equipped in the way that you have described, as of the first of June 1928?" (R. 608). The answer was, "I should estimate the damage at 75 — the value at $75,000 in June" (R. 564).

(1) The fair market value of this plant as of the first of June, 1928 was not relevant. There was, and could be, no evidence in the case as to the fair market value of the plant at any other time or under any other conditions. It was not possible to make any comparison with value under any other conditions. The question did not relate the value inquired for, to any acts of the defendants or to any conditions caused by any acts of the defendants.

(2) This evidence was highly prejudicial and misleading to the jury, because it was fitted to lodge in the minds of the jury the idea that this value of $75,000, when related to the cost of $235,000, had something to do with the liability of the defendants for the difference. The danger of this was increased by the use of this evidence made in the charge as discussed above under the Fourth Assignment.

(3) The Court found that Goldmann was not an expert (R. 601). Goldmann was not an expert or qualified in any way to express an opinion on the fair market value of a parchmentizing plant. He was a ladies' garment manufacturer (R. 546, 565). He had never bought or sold in the market, any such plant. He had never heard of any such sale. Of the cost, $235,000, three-quarters — $151,960.34 and $24,471.94—was for special machinery (R. 579). He had never attempted to market such a

plant. He did not know whether there were any possible purchasers or sellers of such a plant, or, therefore, what price they would pay and take. So far as fair market value could be deduced from cost, the cost was before the Court and jury and Goldmann's estimate could add nothing. His estimate could not be an opinion. It could be no better than a guess.

Seventh Assignment

The District Court erred in admitting the question to the witness Goldmann, and the answer thereto, as to a conversation with Koch

This was a conversation which Goldmann had with Koch in Chicago about the middle of February, 1928. The plaintiffs' counsel offered it as evidence that the defendant competitors had said something when they were in Chicago. The question was, "And was it at that time that you learned something with regard to the prospective cut in price of your competitors?" (R. 608). The answer was, "Yes, sir" (R. 554).

It is noteworthy that the question was not asked for the purpose of showing the information on which Story acted. It was asked admittedly and expressly not for the purpose of showing what Goldmann had learned, but for the purpose of showing the fact that the defendants had, on or about February 16, 1928, said something with respect to a prospective cut in price (R. 554). In this way the jury was informed that the defendants as early as February 17, 1928 had said something with respect to a prospective cut in price. The jury got this information by Goldmann's testimony that Story's agent, Koch, had informed him that the defendants had said something with respect to a prospective cut in price. It did not appear that the defendants had said this to Koch. Therefore the testimony was compound hearsay

of the fact that the defendants had said something with regard to the prospective cut in price.

This testimony was highly prejudicial to the defendants. The plaintiff was trying to maintain that Story's reduction of March 2d was the result of the defendants' plan of February 17, 1928 or prior thereto, not carried into effect until March 9th.

There was no evidence in the case to support any such contention except this piece of compound hearsay. Counsel for plaintiff endeavored to avoid the brunt of this objection by refraining from having the conversation, itself, stated. But this did not affect the result. All that he was after was enough to contend that in substance, the defendants' cut came first. This slight touch of compound hearsay was just as effective as if the language of the conversation had been stated. There was no opportunity to cross-examine Koch as to where he got the information, or in what terms it was couched, or whether it was traceable in any way to the defendants.

The question was objectionable, further, because it called for the results of the conversation in that the witness was asked whether he "learned something." If the subject matter had been admissible at all, it should come only in the terms of what Koch said to him.

The state of Goldmann's learning in this respect was not itself a relevant fact. The plaintiff had a right to cut prices if that was the plaintiff's policy. It was immaterial to anything in the case that the plaintiff's cut was due to an expectation of a cut by the defendants. It was of importance that the defendants' cuts were because of information that they must make them to keep the trade which Story was taking away by cutting. But the plaintiff was not being sued and therefore it was not important to show what actuated the plaintiff in making the cut of March 2d.

But even if it had been important to do this, it was error to permit the plaintiff to show not merely the information which the plaintiff had, but to show as a fact, and expressly for that purpose, that "they [the defendants] had said something when they were there" (R. 554) "with regard to the prospective cut in price." This was an important fact, if it were so, and should not have been permitted to be proved by hearsay.

Eighth Assignment

The District Court erred in admitting the question to the witness Goldmann, and the answer thereto, as to a conversation with Moyer

This conversation was on May 17, 1928. The question was, "Will you state what your conversation was?" (R. 608). The answer was, "I introduced myself to Mr. Moyer, took a seat, and was there probably ten minutes, asking him if he could make money at the present price of parchment, and he told me that he could not. He wanted to know if we could, and I told him no. That was the gist of the conversation, and very little more than that was said. He wanted to know where I was going. I told him, and he wanted to know whether I couldn't stay a little longer, said that he liked to talk to his competitors, that he thought it was good business to be on friendly terms with his competitors. He wanted to know if I was coming back that way, and if I would stop on the way back. I told him that if I came back that way and had the time, I would. That is about all that I recall of the conversation. He walked with me to the head of the stairway, and he said something about these reductions in prices — and I mentioned that they were undoubtedly responsible — or he said something about our being responsible for it, and I said, 'Well, you know better than that' " (R. 561–2).

Moyer was a witness called by the plaintiff. He was not a defendant. He had not been asked concerning this conversation; therefore it was not admissible to contradict him. It did not contradict him. This evidence was another piece of pure hearsay, offered to prove an important fact.

The plaintiff's declaration alleged a reduction of price below reasonable cost and profit. The figures which the plaintiff had introduced from the defendants' books disproved this allegation. There was no evidence to support the allegation except this conversation.

In this way, by hearsay, the plaintiff was permitted to introduce evidence that Moyer could not make money at the present price and that the plaintiff could not (R. 561).

Manifestly this hearsay to prove an otherwise unproved essential allegation of the plaintiff's declaration, was highly prejudicial to the defendants.

This was not all of it. The conversation gave an opportunity to Goldmann to show that he had asserted to Moyer that the plaintiff was not responsible for the cuts, namely, "he [Moyer] said something about our being responsible for them, and I said, 'Well, you know better than that' " (R. 562).

The prejudice was peculiarly grave, because the conversation was left unanswered. The plaintiff had taken Moyer's deposition in Ohio before the trial, and had introduced it in evidence at the trial. This testimony from Goldmann came several weeks after the beginning of the trial and when there was no opportunity for the defendants to cross-examine Moyer as to whether any such conversation had occurred.

Even if it had occurred, it was hearsay, and not admissible in evidence.

There was no evidence that Moyer was a conspirator with the defendants in respect to this conversation, or that the conversation took place in the course of carrying

out any conspiracy, or that in any way Moyer was authorized — expressly or by implication — to admit, for the defendants, that they could not make money at the present price.

It is an instance of the admission of pure hearsay as the only proof of an important allegation of the plaintiff's declaration.

Respectfully submitted,

EDWARD F. McCLENNEN
JOSEPH M. DOHAN
For Defendants-Respondents.

As counsel for the respondents we certify that in our opinion there is just ground for this petition. It is presented in good faith, and not for delay.

EDWARD F. McCLENNEN
JOSEPH M. DOHAN.